Supreme Court, U. S.
FILED
SEP 8 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Nature of Appeal

This is an appeal from the judgment of a three judge district court in the Southern District of New York which unanimously held the challenged provisions of the New

York Attachment Statute, New York Civil Practice Law and Rules, §§ 6201 (4), (5) and (8); § 6211, unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted *ex parte* and without notice. Probable jurisdiction was noted by this Court on April 14, 1975.

Question Presented

The substantive question on this appeal involves the constitutional validity of the New York statutory scheme which permits the pre-judgment seizure of property and debts without notice and hearing and without granting to the defendant a meaningful opportunity to vacate an attachment granted *ex parte* and without prior notice.

Statement of the Case

A. The New York Attachment Statute [Article 62 of the New York Civil Practice Law and Rules]

Article 62 of the Civil Practice Law and Rules of the State of New York contains the New York Attachment Statute, §§ 6201 through 6226 (J.S. 37a-49a).[1]

§ 6201 *inter alia* provides that "[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants" in eight different type situations. Subparagraphs 1, 2, 3 and 7 relate to securing jurisdiction over the defendant and subparagraph 6 relates to the wrongful possession of governmental property, and not having been considered by the

[1] Numbers in parentheses refer to the Appendix (a); Appendix to Jurisdictional Statement (J.S. a) or Plaintiffs' Appendix in the District Court (Pl. App.), which is part of the record on this appeal.

three-judge court, are not involved in this appeal. The other three subparagraphs 4, 5 and 8 relate to various types of alleged fraud on the part of the defendant and are part of the specific subject matter of this appeal (J.S. 38a-39a).

§ 6211 which is also the specific subject matter of this appeal, sets forth the required contents of the order of attachment and, provides *inter alia* "[a]n order of attachment may be granted *without notice* before or after service of summons and at any time prior to judgment" [Emphasis supplied] (J.S. 40a).

§ 6212 (b) requires that the plaintiff "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (J.S. 41a), whereas pursuant to § 6222 the defendant in order to discharge the attachment and release its property must "give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking" (J.S. 48a).

Finally, § 6223 permits the defendant to "move, on notice • • • for an order vacating or modifying the order of attachment [and if] the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment" (J.S. 48a).

B. The Contract Between Wrestling Revue and National Sports

On November 28, 1972, as of the 31st day of October 1972, Wrestling Revue and National Sports Publishing Corporation, entered into a written contract providing for the sale of certain sports publications owned by Wrestling Revue to National Sports for a purchase price of "a minimum of $50,000 and a maximum of $100,000" payable

in specified installments (Pl. App. 46-61). The first installment of $25,000 was paid at the time of the signing of the contract on November 28, 1972. The following two fixed installments of $12,500 each were due and payable on February 28, 1973, and May 28, 1973, respectively. In addition thereto, the contract further provided for additional payments for ten years, based on the after tax profits of National Sports.

National Sports failed to make the installment payment of $12,500 due and payable on February 28, 1973 (Pl. App. 146) and Wrestling Revue instituted an action as plaintiff and against National Sports, as defendant, in the Supreme Court of the State of New York, in and for the County of Westchester, as a result of National Sports' breach thereof, by failing to make such installment payment.

As of April 16, 1973, National Sports had failed to make the $12,500 payment to Wrestling Revue due on February 28, 1973 and on such date was indebted to Wrestling Revue in the amount of $12,500. On May 28, 1973, National Sports was further required to make an additional installment payment to Wrestling Revue of an additional $12,500 which it refused and failed to make.

C. The Negotiations Between Curtis, National Sports and Wrestling Revue and Their Attorneys

Between February 23, 1973 and April 13, 1973, extensive correspondence was had betweeen Curtis and its attorneys and National Sports, its parent company, Whitney Communications Corporation and its attorneys, with respect to certain monies that Curtis allegedly claimed were due to it from a company known as Champion Sports Publishing, Inc. for distributing some of the publications sold to National Sports by Wrestling Revue (Pl. App. 141-144).

During such entire period of time the attorneys for both Curtis and National Sports were in constant communica-

tion with the law firm of Levy and Ledes, the attorneys for both Wrestling Revue and Champion Sports with respect to the alleged claim of Curtis for such monies due to it from Champion Sports.[2]

For many months prior to April 13, 1973, Curtis and its attorneys knew that Levy and Ledes were the attorneys for Wrestling Revue, Champion Sports and Sugar, their Chief Executive Officer, and knew that Messrs. Levy and Ledes were available to accept the service of process or appear in court proceedings or at court hearings on behalf of all or some of such clients, as the situation would require.

D. The Order of Attachment

On April 13, 1973, Curtis, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, applied to the Supreme Court of the State of New York, County of New York, for an order of attachment pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, directing the Sheriff to levy "upon such property in which Sugar, Wrestling Revue and Champion Sports have an interest and upon such debts owing to them as will satisfy Curtis' demand of $28,588.08 together with probable interests costs and Sheriff's fees and expenses." (39a).

In support of such application, made in the form of a motion (39a-58a), without notice to Sugar, Wrestling Revue or Champion Sports, in an action not then commenced, to be entitled "Supreme Court of the State of New

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[2] Thus the statement at page 5 of the Curtis brief that "with the facts uncovered" Curtis confronted appellees' attorneys and "they would give no satisfactory explanation" is pure fantasy. Every *fact* was voluntarily furnished to Curtis by National Sports or Sugar, and appellees' attorney, Gabriel I. Levy was in constant communication with Curtis' attorneys for months before with respect to the matter. The fraud was created in the fertile imagination of Curtis at precisely the moment that Wrestling Revue was to receive its payment from National Sports.

York, County of New York, Curtis Circulation Company, Plaintiff, against Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, Defendants", Curtis contended *inter alia* "that a cause of action for a money judgment exists in favor of Curtis and against Sugar, Wrestling Revue and Champion Sports, jointly and severally, in the sum of $28,588.08 as well as for other sums, together with interest and costs thereon and that Curtis is entitled to recover said sum of $28,588.08 over and above all counterclaims known to it" (39a-40a).

Curtis further contended *inter alia* that it was entitled to an order of attachment against the property of Sugar, Wrestling Revue and Champion Sports on the grounds that:

> (a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201(4)];
>
> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and
>
> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)] (40a).[3]

[3] Thus Curtis sought the Order of Attachment against Champion Sports under subdivisions (4), (5) and (8); against Sugar under subdivisions (5) and (8); and against Wrestling Revue *only* under subdivision (8). Thus, Sugar's wages of $124.17 were seized under subdivisions (5) and (8) and Wrestling Revue's monies amounting to $24,200 were seized solely under subdivision (8), since the only claim against Wrestling Revue for which an attachment is authorized under § 6201 is the nebulous claim against it for fraud [52a-54a]. This distinction is of great significance in view of the recent decisions of this Court in *Mitchell* v. *W.T. Grant Company*, 1974, 416 U.S. 600 and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751.

In further support thereof Curtis submitted to the Court an undertaking of Continental Casualty "in the sum of $10,000, of which amount the sum of $8,570 thereof is conditioned that Curtis will pay to Champion Sports, Wrestling Revue and Sugar all legal costs and damages which may be sustained by reason of the attachment if Champion Sports, Wrestling Revue and Sugar recover judgment or it is finally decided that Curtis was not entitled to an attachment of the property of Sugar, Wrestling Revue and Champion Sports and the balance thereof [of $1,430] conditioned that Curtis will pay the Sheriff all of his allowable fees" (Pl. App. 172).[4]

On April 13, 1973, prior to the commencement of any action, and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, or an opportunity to be heard with respect to the validity of Curtis' underlying claim and Curtis' right to an order of attachment, Mr. Justice Fine pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York signed an order of attachment wherein he made findings of fact adverse to the interests of Sugar, Wrestling Revue and Champion Sports and "[o]rdered the Sheriff of the City of New York or the Sheriff of any county in the State of New York to levy within his jurisdiction at any time before final judgment upon such property in which Champion Sports, Wrestling Revue and Sugar have an interest and upon such debts owing to them as will satisfy Curtis' de-

[4] Thus while the order of attachment was in the amount of $28,588.08, Curtis was only required to give an undertaking in the amount of $10,000 of which amount only $8,750 was to indemnify appellees for damages, the balance thereof to indemnify the Sheriff for his fees. Since the amount actually attached by the Sheriff amounted to $24,324.17, appellees in order to dissolve the attachment under § 6222 would have had to give an undertaking in almost three times the amount of the undertaking given by Curtis to secure the attachment.

mand of $28,588.08, together with probable interest, costs and Sheriff's fees and expenses and that he proceed thereon in the manner required by law" (39a-41a).

E. The Sheriff's Levy and the Payment of the Appellees' Money to the Sheriff

On April 16, 1973, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports or their attorneys, the Sheriff by one of his deputies caused the order of attachment to be served upon National Sports and levied thereunder upon all monies then due pursuant to § 6214 of the Civil Practice Law and Rules and thereafter coming due to Sugar and Wrestling Revue from National Sports up to the amount of $28,588.08.

On April 26, 1973, National Sports served a Garnishee Statement (78a) pursuant to § 6219 of the Civil Practice Law and Rules upon the Sheriff with respect to monies then owed by it to Wrestling Revue pursuant to the agreement of November 28, 1972 and paid to the Sheriff "$9,323.54, in discharge to the extent of such payment of its obligation to Wrestling Revue with respect to the February 28, 1973 purchase price installment" (79a), which monies were the property of, and belonged to Wrestling Revue, and to which it was immediately entitled to the beneficial use thereof.

On May 2, 1973, National Sports made a further payment pursuant to the order of attachment and levy to the Sheriff of $200 which monies were the property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof (Pl. App. 148). On May 16, 1973, National Sports made another further payment pursuant to the order of attachment and levy to the Sheriff of $124.17, which monies were wages then due to Sugar and

to which he was immediately entitled to the beneficial use thereof.[5]

F. The Second Levy

As of May 24, 1973, Curtis admitted in the state court action then pending between it and Sugar, Wrestling Revue and Champion Sports, that the maximum amount that was then due to it from Champion Sports was $17,857.49 (Pl. App. 152-154). Curtis never took the necessary action to reduce the amount of the order of attachment to reflect the reduced amount it claimed as of May 24, 1973.

On May 28, 1973, National Sports pursuant to the agreement of November 28, 1973, was required to make a further installment payment to Wrestling Revue of $12,500 (Pl. App. 47) which it refused and failed to make as a result of the order of attachment and Sheriff's levy served upon it on April 16, 1973.

On September 24, 1973, the Sheriff re-served the order of attachment upon National Sports and made a second levy again in the amount of $28,588.08, notwithstanding that the maximum amount then claimed by Curtis was only $17,857.49 (Pl. App. 154) and of which the Sheriff had already taken possesion of $9,647.71.

Pursuant to § 6214(b) of the Civil Practice Law and Rules of the State of New York, a levy made under an order of attachment expires ninety days after service thereof and as a result of the refusal and failure of Na-

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[5] CPLR § 5205(e) exempts 90% of income from attachment and therefore only 10% of the wages then due to Sugar amounting to $124.17 was withheld by National Sports and paid by it to the Sheriff pursuant to the Order of Attachment and levy made thereunder. This prejudgment seizure of Sugar's wages without notice and hearing is precisely similar to the garnishment of wages under Wisconsin law, which was declared unconstitutional by this Court in *Snaidach* v. *Family Finance Corporation of Bayview*, 1969, 395 U.S. 337.

tional Sports to pay over to the Sheriff the $12,500 installment due to Wrestling Revue, on May 28, 1973, such second levy made on September 24, 1973, would have expired on December 24, 1973.

On December 4, 1973, Curtis, without notice to the attorneys for Sugar, Wrestling Revue and Champion Sports, who had appeared in such action on April 18, 1973, and interposed their answer to Curtis' complaint on April 27, 1973, applied to the Supreme Court of the State of New York, County of Westchester, where the action was then pending, for an order extending the second levy until March 24, 1974 (Pl. App. 134-138).

On December 7, 1973, and without notice to Sugar, Wrestling Revue and Champion Sports, or their attorneys, or affording them a prior hearing or an opportunity to be heard with respect to Curtis' application for a ninety day extension of such levy, Mr. Justice Beisheim, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, signed an order granting such motion of Curtis and extended such levy to March 24, 1974, with respect to "[a]ll property in the possession or control of National Sports in which Champion Sports, Wrestling Revue and Sugar have any title or interest" (Pl. App. 134-135).

On April 16, 1974, Curtis secured a further order from the Supreme Court of the State of New York, County of Westchester, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, extending the levy under the Order of Attachment for an additional year, until March 24, 1975, with respect to "[a]ll property in the possession or control of National Sports Publishing Corporation in which any or all of the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, have any title or interest" (Pl. App. 139-140).

G. The Settlement of the Dispute Between National Sports and Wrestling Revue

On March 8, 1974, Wrestling Revue and National Sports entered into an agreement (Pl. App. 155-165) settling all disputes between them, which *inter alia* provided for the payment of $15,676.46 by National Sports to Wrestling Revue in stated installments on April 30, 1974, May 31, 1974 and June 30, 1974 (Pl. App. 157-158) and further provided that if on the due date of any payment provided for therein, such payment is subject to the levy under the Order of Attachment, or any renewal or extension thereof, National Sports shall make such payment to the Sheriff of the City of New York, instead of Wrestling Revue.

H. The Further Payments of Wrestling Revue's Money by National Sports to the Sheriff

On April 30, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $4,865 (Pl. App. 166) which monies were the sole property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

On June 5, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $5,000 (Pl. App. 167) which monies were the sole property of, and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

On July 1, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $4,811.46, which monies were the sole property of, and belonged to Wrestling Revue, and to which it was immediately entitled to the beneficial use thereof.

I. The Failure of the Sheriff to Respond to Plaintiffs' Demands

On December 21, 1973, prior to the commencement of this action and again on June 20, 1974, appellees' attorneys wrote to the Sheriff demanding that he forthwith alvise "as to the amounts of monies presently being held by [him] pursuant to such Order of Attachment" (99a-102a). No response has ever been received from the Sheriff with respect to such demands, notwithstanding the fact that the monies being held by him is the sole and exclusive property of the appellees.

This certainly is not the type of "judicial supervision and management" approved by this Court in *Mitchell* v. *W. T. Grant Company,* 416 U.S. at 618. The appellees, as indicated by the actions of the Sheriff herein, or better characterized by his inaction, are "at the unsupervised mercy of the creditor [Curtis] and court functionaries [the Sheriff]" explicitly rejected by this Court in *Mitchell,* since there is nothing in the New York Attachment Statute to protect the appellees, at least to the extent of receiving an accounting from the public official that holds their monies, and there are no "measures adopted by the State [of New York] to minimize the risk that the ex-parte procedure will lead to a wrongful taking." 416 U.S. at 616-617.[6]

The Opinion Below

The three-judge District Court whose decision is reported at 383 F. Supp. 643 (J.S. 1a-14a) unanimously held the "challenged provisions [of the New York Attachment Statute, CPLR §§ 6201 (4) (5) and (8); § 6211] unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment

[6] The Sheriff of the City of New York was a party to the District Court action, but failed to appear or answer therein and is in default.

granted ex parte and without prior notice" (J.S. 12a; 383 F. Supp. at 650).

The District Court in a unanimous opinion by Judge Lasker, after reviewing the recent decisions of this Court in *Snaidach* v. *Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Mitchell* v. *W. T. Grant Company,* 416 U.S. 600 (1974) which dealt with similar statutes, concluded that the New York statute unlike the Louisiana statute upheld in *Mitchell* "do[es] not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and it] f[o]und that the opportunity for such a hearing was critical to the holding in *Mitchell,* and its absence renders New York's statute fatally defective" (J.S. 7a-8a; 383 F. Supp. at 648).

In reaching this conclusion the District Court noted (J.S. 8a-10a; 383 F. Supp. at 648-649):

> "There are several reasons why § 6223—the sole mechanism available to a defendant who seeks to vacate the attachment—does not meet the standards of the *Mitchell*-Louisiana statute which provided in straightforward language (Article 3506, Louisiana Code of Civil Procedure): 'The defendant by contradictory motion may obtain dissolution of a writ of attachment or of sequestration *unless the plaintiff proves the grounds upon which the writ was* issued.' [Emphasis in decision of the District Court]
>
> "By its terms, that is, the Louisiana law required that the attachment be vacated unless the grounds upon which it was issued are proven, and imposed the burden of such proof on the creditor.
>
> "The New York Statute affords neither protection. The sole basis for vacating the attachment under the CPLR is *not* that the grounds upon which it has been issued are unproven, but rather that the attachment

'is unnecessary to the security of the plaintiff'; and the burden of proof is not, as in *Mitchell,* on the plaintiff, but on the defendant.

"That this is not too narrow or literal a reading of the language of 6223, is resoundingly confirmed by numerous holdings of the New York courts. Without exception they have ruled—for at least fifty years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based 'clearly indicate that the plaintiffs must ultimately fail.' • • •. The burden is on the defendant to establish that the plaintiff *cannot* succeed, • • •; and to demonstrate that the plaintiff has not established a cause of action, which permits attachment, • • •; and to establish that the attachment is unnecessary for the security of the plaintiff, [citing New York cases].

"Indeed under the decisions of New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223—a construction which we believe is proper in the light of the strictly limited wording of the law." [citing New York cases].

While the District Court found these considerations to be dispositive, it found "other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone since

> "In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion (J.S. 10a; 383 F. Supp. at 649-650 [and], [t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex-parte determination where, as here, the critical allegations of fraud, however detailed, are based on information and belief" (J.S. 11a; 383 F. Supp. at 649-50).

Summary of Argument

Notwithstanding all the rhetoric to the contrary, the New York Attachment Statute makes no provision for a defendant to avail himself of a right to a hearing at a meaningful time and in a meaningful manner. The right to such a hearing, at most, is discretionary with the court. The vacatur provision affords a right within the limits of the statute and under the decisions of New York courts the merits of the action are irrelevant on a motion to vacate the attachment under CPLR § 6223. The prescribed standard of New York's Court of Appeals is a jurisdictional one requiring the burden to be borne by the defendant to show that "the plaintiff must ultimately fail" *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 377 (1923), or that the plaintiff has not established a cause of action justifying the drastic remedy of attachment, *American Reserve Inc. Co.* v. *China Ins. Co.,* 297 N.Y. 322, 325 (1948).

It is futile to argue that the lower court in its opinion failed to interpret the New York law and cases correctly. It is axiomatic that jurisdictional challenges to the papers on which an attachment writ is issued are always available. To state that the court below misinterpreted the New York law for failure to sweep into its opinion the minute debris of jurisdictional reasons for vacatur constitutes a legal *non sequitur.*

In the rash of recent cases of New York's lower courts, which opinions have proliferated in the New York Law Journal, the reasons for vacatur being granted or denied were jurisdictional in nature. Jurisdictional issues, failure to state a cause of action, the plaintiff cannot prevail, or intent may not be presumed are but a few of the reasons set forth by the courts. Appellants cite the court dicta in these opinions to support their position. In this plethora of opinion not one single word is set forth of substance to the effect that a defendant has an immediate hearing as a

matter of right, in which the plaintiff must assume the burden of proving his case.

The appellants' contention is that it is the compelling interest of the state to discourage fraud. Respondents' rejoinder is that it is more compelling that a victim of a fraud allegation be afforded a due process right to defend as envisioned constitutionally.

Curtis' allegation of fraud is illusory, fictional and peculiarly suited to slide into the enabling recital of the New York Attachment Statute. The statutory sequestration procedures of Louisiana are so narrowly drawn that they are limited to a creditor having a specific right in the property to be seized. The New York procedure is amorphous, fluid, broad and unlimited. In the herein case we have Curtis, without a possessory prior right, nor a color of a claim of interest, attaching monies due Sugar and Wrestling Revue in April of 1973. Not having ever advanced any fungible currency to Sugar personally or Wrestling Revue, Curtis' writ of attachment deprives both of monies which arises from a contractual claim against Champion. The recital of fraud produced the necessary connection under the New York attachment provisions. The availability of the allegation of fraud in any contract action puts a premium on rascality for it affords a convenient means of grabbing the jugular.

The statutory scheme is so broad and rambling that the seizure of property without due process may be accomplished, as it was here, by joining parties on the allegations of a hearsay affidavit in which a plaintiff-creditor may weave a fictional account of errant misdeeds and thereby deprive the defendants of the very funds to feed the sinews with which they must defend themselves. The pragmatic reality is that defendants are rendered incapable of using their funds for legal assistance to defend themselves, thus compounding the deprivation of respondents Sugar and Wrestling Revue's Fourteenth Amendment rights to due process.

ARGUMENT FOR APPELLEES

POINT I

The New York Attachment Statute is not constitutionally permissible in that it puts defendants' property totally beyond use without notice or opportunity for an early hearing on the bare allegation of a *prima facie* case by a plaintiff and places the burden of proof on the defendant.

A. Historical Precedents

The constitutionality of summary procedures authorizing the prejudgment seizure of personal property was seldom challenged prior to the decision of this Court in *Snaidach* v. *Family Finance Corporation of Bayview,* 1969, 395 U.S. 337. In the few cases wherein such procedures were challenged they were universally upheld on the rationale that there would have to be an adjudication of the rights of the parties before the property could finally be subjected to the plaintiffs' claim, and that therefore an attachment or garnishment was not a deprivation of property without due process of law, within the meaning of constitutional provisions (See 6 Am. Jurs. 2d Attachment and Garnishment, § 5; 18 A.L.R. Fed. 223, 230, Validity of Prejudgment Seizure).

In three cases long prior to *Snaidach,* this Court had permitted the attachment of property without notice and a prior hearing. In *Ownbey* v. *Morgan,* 1921, 256 U.S. 94, the court upheld the constitutionality of Delaware's foreign attachment law, even though that law provided that the defendant could not even appear and defend until he had given security in the amount of the value of the property attached. In *Coffin Brothers & Co.* v. *Bennett,* 1928, 277 U.S. 29, the Court sustained the constitutionality of a Georgia statute that authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been

levied. In *McInnes* v. *McKay,* 1929, 279 U.S. 820 the Court in a per curiam decision affirmed a holding of the Supreme Court of Maine (1928, 127 Me. 110, 141 A. 699), that rejected a contention that a Maine statute which permitted attachment without affidavit or bond in advance of judgment deprived the defendant-debtor of due process of law.[7]

However, Supreme Court cases prior to *Snaidach* had established that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend" (*Windsor* v. *McVeigh,* 1864, 93 U.S. 274, 277), and that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they are to enjoy that right they must be notified" (*Baldwin* v. *Hale,* 1864, 68 U.S. 223). The theme that "due process of law signifies a right to be heard in one's defense" (*Hovey* v. *Elliot,* 1897, 167 U.S. 409, 417) has continually recurred in the years since *Baldwin, Windsor* and *Hovey* (*Boddie* v. *Connecticut,* 1971, 401 U.S. 371, 377-378 and cases cited at footnote 3) and "[t]he fundamental requisite of due process of law is the opportunity to be heard" (*Grannis* v. *Ordean,* 1914, 234 U.S. 385) "which must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo,* 1965, 380 U.S. 545, 552).

B. *Snaidach* v. *Family Finance Corporation of Bayview,* 1969, 395 U.S. 337

It was against this array of formidable authority that Mrs. Snaidach launched her constitutional attack on the

[7] This statute was recently declared unconsittutional by a three-judge court in *Gunter* v. *Merchants Warren National Bank,* D. Maine 1973, 360 F.Supp. 1085, as was the Massachusetts attachment statute upon which the Maine statute was based (*Schneider* v. *Margossian,* D. Mass. 1972, 349 F.Supp. 741, three-judge court).

Wisconsin garnishment statute which permitted the creditor, without notice or hearing, to require the employer to withhold from the defendant part of her wages, pending a trial on the merits in the main suit. Mrs. Snaidach contended that the Wisconsin statute violated due process because it enabled the creditor to take property before a hearing on the validity or probable validity of the underlying obligation. This Court agreed and declared the Wisconsin statute unconstitutional "that absent notice and a prior hearing • • • this prejudgment garnishment procedure violates the fundamental principles of due process" (395 U.S. at 342).

In a concurring opinion Mr. Justice Harlan pointed out "that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use" (395 U.S. at 343).

The seed of *Snaidach* reached far and wide and resulted in the decimation of many state attachment statutes,[8] garnishment statutes[9] and other provisional remedies, long

[8] Alaska: *Etheridge* v. *Bradley,* Alaska 1972, 502 P.2d 146; California: *Randone* v. *Appellate Dept. of Sup. Ct. of Sacramento,* 1971, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709; *Damazo* v. *MacIntyre,* 1972, 26 Cal. App. 3d 18, 102 Cal. Rptr. 609; Delaware: *Mills* v. *Bartlett,* Del. Super. 1970, 265 A.2d 39; Washington: *Lucas* v. *Stapp,* 1972, 497 P.2d 250, 6 Wash. App. 971; *Seattle Credit Bureau* v. *Hibbitt,* 1972, 449 P.2d 92, 7 Wash. App. 219. The cases which followed *Fuentes* in declaring state attachment statutes unconstitutional are legion and just too numerous to mention.

[9] Alabama: *McMeans* v. *Schwartz,* S.D. Ala. 1971, 330 F. Supp. 1397 [wages], Arizona: *Arnold* v. *Knettle,* 1969, 10 Ariz. App. 509, 460 P.2d 45 [wages]; *Western Coach Corp.* v. *Shreve,* D. Ariz. 1972, 344 F. Supp. 1136 [bank account]; California: *McCallop* v. *Carberry,* 1970, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666; *Cline* v. *Credit Bureau of Santa Clara Valley,* 1970, 1

(footnote continued on following page)

before the historic decision of this Court in *Fuentes* v. *Shevin,* 1972, 407 U.S. 67, including the New York replevin statute (*Laprease* v. *Raymours Furniture Company,* N.D. N.Y. 1970, 315 F.Supp. 716, three-judge court).

The subsequent amendment and application of the New York Replevin Statute (CPLR, Article 71) is most helpful in determining as to what constitutes "due process of law". The replevin statute declared unconstitutional in *Laprease* was strikingly similar to the Florida and Pennsylvania statutes subsequently struck down in *Fuentes.* It was amended in 1971 to require a court order "upon such terms as may be required to conform to the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States" (CPLR § 7102(d)(1)). In applying such provision the New York courts have invariably required prior notice and hearing before granting an order to seize a chattel since the statute means and due process requires "notice to the [alleged debtor] and an opportunity to be heard," before he may be deprived of his property (*Cedar Rapids Engineering Co.* v. *Haenelt,* App. Div. 3rd Dept. 1972, 39 A.D. 2d 275, 333 N.Y.S.2d 953, 956; see also *Finkenberg Furniture Corp.* v. *Vasquez,* Civil Ct., N.Y. County 1971, 67 Misc. 2d 154, 324 N.Y.S.2d 840; *Kosches* v. *Nichols,* Civil Ct., N.Y. County, 1971, 68 Misc. 2d 795, 327 N.Y.S.2d 968, both decided prior to *Fuentes*).

(*footnote continued from preceding page*)

Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669, Georgia; *Reeves* v. *Motor Contract Company of Georgia,* N.D. Ga. 1971, 324 F.Supp. 1011 [wages]; *Aaron* v. *Clark,* N.D. Ga. 1972, 342 F.Supp. 898 ["specialized" property]; Illinois: *Scott* v. *Danaker,* N.D. Ill. 1972, 343 F. Supp. 1272 [non-wage assets]; Minnesota: *Jones Press, Inc.* v. *Motor Travel Services, Inc.,* 1970, 286 Minn. 205, 176 N.W.2d 87; New Mexico: *Galindo* v. *Western States Collection Co.,* 1970, 82 N.M. 14, 477 P.2d 325; Wisconsin: *Larson* v. *Fetherston,* 1969, 44 Wis.2d 712, 172, N.W. 2d 20 [accounts receivables]. Again, the cases which followed *Fuentes* are legion and just too numerous to mention.

C. *Fuentes* v. *Shevin,* 1972, 407 U. S. 67

On June 12, 1972, this Court removed any doubt as to the far reaching effect of *Snaidach* with respect to the validity of prejudgment seizures without notice or hearing when it decided *Fuentes* v. *Shevin,* 407 U.S. 67.

Fuentes involved the validity of the Pennsylvania and Florida replevin statutes where purchasers of household goods challenged their constitutionality. These laws permitted a private party, without a prior hearing or notice to the other party, to obtain a writ of replevin upon an *ex parte* application to the clerk of the court and upon posting a bond. Upon delivery of the writ of replevin to the Sheriff he was required by law to seize the property. Thereafter the defendant had the right to reclaim possession by posting his own bond (407 U.S. at 73-78). Sellers holding purchase money security interests utilized this remedy when their buyers allegedly defaulted in making payments. The buyers contended that the fact that they had missed installment payments did not prove that they were in default, because their sellers had breached their warranties respecting the goods and were thus subject to an offset in the price to the extent of those breaches.

The buyers alleged that the sellers' use of replevin under this circumstance amounted to a taking of their property before they had an opportunity to be heard on the validity of the claim under which the taking was made, in violation of the due process clause of the Constitution. Three-judge district courts in both cases (*Fuentes* v. *Faircloth,* S.D. Fla. 1970, 317 F.Supp. 954; *Epps* v. *Cortese,* E.D. Pa. 1971, 326 F.Supp 127) upheld the constitutionality of the challenged replevin provisions but this Court, reversed these decisions and held that the Florida and Pennsylvania replevin laws violated the due process clause since they had the effect of depriving the defendants of their property, prior to an opportunity to be heard on the validity, or at least the probable validity of the underlying claim.

Mr. Justice Stewart speaking for the Court pointed out at 407 U.S. at 84, 85

> "[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"

citing *Snaidach and Bell* v. *Burson,* 1971, 402 U.S. 535.

Fuentes rejected the contention that *Snaidach* only restrained creditors in their use of pre-judgment remedies where they were employed to take wages or other necessities of life, 407 U.S. at 88, 89.

> "This reading of Snaidach • • • reflects the premise that [this case] marked a radical departure from established principles of procedural due process. [I]t did not. [It was] in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect • • • . While Snaidach . . . emphasized the special importance of wages • • • [it] did not convert that emphasis into a new and more limited constitutional doctrine.
>
> "Nor did [it] carve out a rule of 'necessity' for the sort of nonfinal deprivation of property that [it] involved • • •. The Fourteenth Amendment speaks of property generally."

In this context Mr. Justice Stewart referred to *Bell* v. *Burson, supra,* which held 402 U.S. at 539 that "it is an 'important interest' [that is] entitled to the protection of procedural due process of law" (407 U.S. at 89). Certainly in addition to Sugar's wages, protected by *Snaidach,*[10] the $24,200 belonging to Wrestling Revue seized by the Sheriff without prior notice or hearing is such an

[10] See footnote 5, *ante* at p. 9.

"'important interest' entitled to the protection of procedural due process of law" (see also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 1975, —— U.S. —— 42 (Ed. 2d 751, 757).

Fuentes recognized that prejudgment remedies may be used under some circumstances for the purpose of acquiring jurisdiction over the defendant or his property to implement what is "clearly a most basic and important public interest" (*Ownbey* v. *Morgan, supra*) and "to protect the public against [some] sort of immediate harm", where it is "necessary to secure an important governmental or public interest [and] there has been a special need for very prompt action" (407 U.S. at 91).

Mr. Justice Stewart carved out one final exception which would permit the use of prejudgment seizures without notice or hearing when he stated, 407 U.S. at 93 that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." Presumably in such cases summary seizures would be permitted. But he further pointed out that the Pennsylvania and Florida replevin statutes "are not narrowly drawn to meet any such unusual condition." *Snaidach* (395 U.S. at 339).

Such a case was soon to reach the Supreme Court in *Mitchell* v. *W. T. Grant Company,* 1974, 416 U.S. 600.

D. *Mitchell* v. *W. T. Grant Company,* 1974, 416 U.S. 600, Its Breadth and Scope

On May 13, 1974, during the pendency of this case, this Court upheld the constitutionality of the Louisiana sequestration statute, which under very limited circumstances permitted a prejudgment seizure of property without notice or hearing "[w]hen one claims the ownership or right to possession of property, or a mortgage lien or privilege thereon • • • if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues

therefrom or remove the property from the parish, during the pendency of the action" (Louisiana Code of Civil Procedure, Art. 3571, 416 U.S. at 605, 623).

At first glance it might appear that *Mitchell* overruled *Fuentes,* however, a careful reading of *Mitchell* clearly indicates that its holding stands for nothing more than the exception carved out by the Court in *Fuentes* where the "creditor [was able to] make a showing of immediate danger that a debtor will destroy or conceal disputed goods [and the Louisiana sequestration statute was] narrowly drawn to meet * * * such unusual condition" (*Fuentes,* 407 U.S. at 93). This fact was recognized by Mr. Justice White when he pointed out 416 U.S. at 615 that the Court was "convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that before [it] and that it [did] not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in [Mitchell]."

At best, it can be said that the holding in *Mitchell* stands for the proposition that the constitutional validity or invalidity of each prejudgment seizure statute is to be determined as to whether the "statutory procedure effects a constitutional accommodation of the conflicting interest of the parties" in the specific property which is the subject of the seizure (416 U.S. at 607). It is specifically inapplicable "where the property sequestered by the court is exclusively the property of the debtor [which] may [not] be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized" (416 U.S. at 604) and the holding in *Mitchell* is specifically "limited to the constitutionality of the Louisiana sequestration procedure" (416 U.S. at 618, Ftn. 13).

An examination of the Louisiana sequestration statute clearly indicates that it is a "narrowly drawn" statute to meet an unusual condition (*Snaidach,* 395 U.S. at 339; *Fuentes,* 407 U.S. at 193), namely the fact that both

seller and buyer had current real interests in the property" (*Mitchell,* 416 U.S. at 604).

Louisiana statutes provide for sequestration where "one claims the ownership or right to possession of the property or a mortgage, lien or privilege thereon . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action" Art. 3571 (416 U.S. at 605, 623). The writ, however, will not issue on the conclusionary allegation of ownership or possessory rights. The writ shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts "shown by a verified petition or affidavit". Art. 3501 (416 U.S. at 605, 621). The clear showing required must be made to a judge and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond to protect the vendee against all damages in the event the sequestration is shown to have been inprovidently granted. Arts. 3501 and 3574 (416 U.S. at 605-606, 621-623).

"The writ is obtainable on the creditors ex parte application without notice to the debtor or opportunity for a hearing, *but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued'* Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order the return of the property and assess damages in favor of the debtor, including attorney's fees" (416 U.S. at 606, 622, emphasis supplied), which right is not granted by the New York Attachment Statute, and is a fatal defect therein, making it unconstitutional both on its face and in its application (see CPLR § 6223).

This Court narrowed the issue as "to one for a hearing on the issues in the possessory action—default, the exist-

ence of a lien and possesssion of the debtor—before property is taken'' (416 U.S. at 607).

Mr. Justice White in Part II of the court's opinion in sustaining the constitutional validity of the Louisiana sequestration statute gave five reasons why the statute was constitutionally valid (416 U.S. at 607-610), the clear implication being that all five requirements *must* be present to sustain the constitutionality of the statute, since it "protects the debtor's interest in every conceivable way" (416 U.S. at 618). Conversely none of such requirements are present in the New York Attachment Statute.

1. The seller has a vendor's lien on the property to be seized and because of the lien has an interest in the property, which may be even greater than that of the purchaser, measured by the unpaid balance of the purchase price (416 U.S. at 607-608). The New York Attachment Statute, does not relate to property in which the creditor has a vendor's lien or any possessory interest therein, but relates solely to property in which the creditor has no present interest and which is exclusively the property of the alleged debtor. As pointed out by the Court below "Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion" (J.S. 10a; 383 F.Supp. at 649) thereby making the New York Attachment Statute unconstitutional on its face.

2. "[T]here is real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller" (416 U.S. at 608-609). No such danger existed in the present proceeding since the property of the appellees was in the possession of a third party, National Sports and thus there was no "danger of destruction or alienation" pending notice and a hearing of the merits of appellees' claim making the New

York Attachment Statute unconstitutional, at least in its application herein.

3. "The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and * * * it comports with due process to permit the initial seizure on sworn ex parte documents followed by the early opportunity to put the creditor to his proof" (416 U.S. at 609-610). As Judge Lasker pointed out in convening the three-judge court below this "differs radically from the case at hand where the basis for attachment—fraud—is not amenable to such proof" (J.S. 29a; 377 F. Supp. at 1063) and as determined by the three-judge Court below "[t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief." (J.S. 11a; 383 F. Supp. at 650).[11] Furthermore, the New York Attachment

[11] The only claim of Curtis which might be said to "turn on the existence of the debt" and which might be an "uncomplicated matter that lend[s] [itself] to documentary proof" is that asserted against Champion Sports for monies due under the distribution agreement, and Champion was the only party in privity with Curtis against whom a debt might be said to exist. The claims asserted against Sugar and Wrestling Revue whose property was seized is based on a nebulous and farfetched theory of fraud, there being no creditor-debtor relationship, which involve extremely complicated factual and legal theories which must be established by Curtis and certainly do not lend themselves to "documentary proof". See affidavit of Stuart J. Freedman, Curtis' corporate secretary in support of the Order of Attachment (41a-46a), which is based on an "if" situation contrived in his imagination and is more fantasy than fact. These allegations constitute hearsay of the worst sort, and Freedman's testimony would be inadmissible at *any* hearing by any interpretation of the rules of evidence since he *never* engaged in any of the transactions, meetings or operational negotiations with any of the appellees during the course of the business relationships between Curtis and Champion Sports, and had *never* even met or spoken to Mr. Sugar.

Statute makes no provision for an "early opportunity to put the creditor to his proof" which is deferred until the eventual trial on the merits, which may be several years hence[12] which fails to minimize the risk of a wrongfully issued attachment, thus again making the New York Attachment Statute unconstitutional both on its face and in its application.

4. The impact on the debtor of deprivation of his property does not override his inability to make the creditor whole for wrongful possession and there is risk of destruction or alienation if notice and a prior hearing are supplied (416 U.S. at 610). There is no contention made by Curtis that either Sugar[13] or Wrestling Revue would be unable to pay any eventual judgment recovered against either of them by Curtis, nor does the New York Attachment Statute require such to be the case (CPLR § 6201). There certainly was no risk of destruction or alienation prior to notice and the holding of a hearing, since the property seized was in the hands of a third party, namely National Sports, again making the New York Attachment Statute unconstitutional both on its face and in its application herein.

5. The final and perhaps the most pervading reason that convinced this Court to sustain the constitutionality of the Louisiana sequestration procedure is the fact that "the debtor may immediately have a full hearing on the matter

[12] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two and a half years ago, the case has not as yet even reached the ready trial calendar, which is at least one and a half to two years behind, and there is no provision in the New York Attachment Statute to put the creditor to his proof, until the trial on the merits at some unknown date in the future.

[13] Sugar is a most substantial citizen, having deep roots in his community, the father of two children, a homeowner, a community leader, a nationally known sportswriter and currently employed in the communications business.

of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession." (416 U.S. at 610). This right of an immediate hearing requiring "the plaintiff to prove the grounds upon which the writ was issued" is not afforded under the New York Attachment Statute, which in and of itself makes it constitutionally invalid, as subsequently resoundingly pointed out by this Court in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751, in holding the Georgia garnishment statute unconstitutional for just such reason.

Concededly, Mr. Justice White refers to the fact that the seizure is permitted only by a judge's order and that "the process proceeds under judicial supervision and management" (416 U.S. at 619), however, he did not allude to such as one of the five basic requirements in sustaining the constitutional validity of the Louisiana statute, and the fact that a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid.[14]

In considering the breadth of the court's decision in *Mitchell* in determining the constitutional validity or invalidity of the New York Attachment Statute it must be borne in mind that this Court limited its application "to the constitutionality of the Louisiana sequestration proce-

[14] The fact that under New York CPLR § 6211 a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid for failure to provide an immediate and adequate post-attachment hearing requiring the creditor to prove the grounds upon which the attachment was granted or at least to establish probable cause therefor. "[T]he fact that the official who signs the writ after the ex parte application is a judge instead of a court clerk is of no constitutional significance." (*Mitchell* v. *W. T. Grant Company*, 416 U.S. at 632, dissenting opinion of Justice Stewart) and the "clerk-judge distinction" is of little significance (*North Georgia Finishings, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d at 765, dissenting opinion of Mr. Justice Blackman).

dures" (416 U.S. at 618, Footnote 13). Mr. Justice White specifically excluded from its application situations where the "property sequestered by the court is exclusively the property of the debtor" when he pointed out 416 U.S. at 604:

> "Plainly enough this is not a case where the property sequestered by the court is exclusively the property of the debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property * * *. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."

E. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751

On January 22, 1975, after the decision below, this Court, in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d 751, considered and held unconstitutional a not dissimilar Georgia garnishment statute which made "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment" (42 L. Ed. 2d at 751) being the very same reason that the District Court herein had just previously declared the challenged sections of the New York Attachment Statute unconstitutional.

In *Di-Chem* this Court reaffirmed the decision in *Fuentes* v. *Shevin*, 407 U.S. 67 that " '[a]ny significant taking of property by the State is within the purview of the Due Process Clause.' 407 U.S. at 86 [and that] [b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment" 42 L. Ed. 2d at 757.

For the same reasons as in *Fuentes* this Court held the Georgia statute unconstitutional holding 42 L. Ed. 2d at 757:

> "Here, a bank account, surely a form of property, was impounded and absent, a bond put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."

In so holding that the Georgia statute was unconstitutional in violation of the Due Process Clause this Court held 42 L. Ed. 2d at 751 that it was not saved by the more recent decision in *Mitchell* v. *W. T. Grant Company*, 416 U.S. 600 upholding the Louisana sequestration Statute since among other things "[t]he Louisiana law also expressly entitled the debtor to an immediate hearing after seizure, and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued" and that under the Georgia statute precisely as in the New York statute *sub judice*, a sizable amount of money was frozen,

> "and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[15]

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[15] In fact the Georgia statute actually affords the alleged debtor greater protection in certain respects than the New York statute since similar to the Louisiana statute upheld in *Mitchell* and the Florida and Pennsylvania statutes declared unconstitutional in *Fuentes*, the Georgia statute "requires plaintiff to file a bond in a sum double the amount sworn to be due" Ga. Code Ann. § 46-102, 42 L. Ed. 2d at 755, whereas the New York statute CPLR

(footnote continued on following page)

Mr. Justice Powell in his concurring opinion found "[t]he most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate post garnishment hearing" and in making "no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, nor any indication that the garnishor bears the burden of proving entitlement to the garnishment" 42 L. Ed. 2d at 761.

Likewise the challenged provisions of the New York Attachment Statute are unconstitutional in violation of the Due Process Clause since it makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual trial on the merits, which may be several years hence[16] and during such long delay, the seizure continues without abatement. "Due process requires that the State afford an opportunity for a prompt post-garnishment judicial hear-

(*footnote continued from preceding page*)

§ 6212(b) only requires the plaintiff to "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (see footnote 3, *ante* at p. 6). Of course "as a matter of constitutional principle, [a bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind" (*Fuentes* v. *Shevin*, 407 U.S. at 83-84).

[16] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two and a half years ago, the case has just recently been placed on the trial calendar by Curtis, which is almost another two years behind. Thus it will be almost three years from the time of the attachment until appellees receive their hearing on the merits which will enable them for the first time to seek to dissolve the attachment by putting Curtis to its proof, and during such entire period of time appellees have been deprived of their money amounting to $24,324.17.

ing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 42 L. Ed. 2d at 760, concurring opinion of Mr. Justice Powell).

The District Court applied *Mitchell* to the challenged provisions of the New York Statute (CPLR §§ 6201(4), (5) and (8) and § 6211) in the same manner as this Court most recently did to the Georgia Statute in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* to determine whether it could "squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*" (J.S. 6a; 383 F. Supp. at 647). As this Court found "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana Statute" (42 L. Ed 2d at 757), so the District Court found that "the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and] the opportunity for such a hearing was critical to the holding in *Mitchell*, and its absence renders New York's Statute fatally defective" (J.S. 7a-8a; 383 F. Supp. at 648). Any doubt on this point was laid to rest by this Court in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*

F. The New York Attachment Statute and Due Process

Pervading throughout the decision in *Mitchell* is the fact that the Louisiana sequestration procedure provides and entitles "the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued" (416 U.S. at 606) and, "the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession." (416 U.S. at 610). Thus,

under the Louisiana sequestration procedure the debtor may immediately seek a hearing on the merits at which the burden of proof is upon the plaintiff to prove the grounds upon which the writ was issued.[17]

There is no similar provision in the New York Attachment Statute which grants to the defendant an immediate hearing or for that matter, any hearing, prior to the eventual trial on the merits, requiring the plaintiff to prove the grounds upon which the attachment was granted thus making the New York Attachment Statute unconstitutional, both on its face and in its application.

The only section of Article 62 which permits the defendant to seek a dissolution of the attachment is § 6223 of the New York Civil Practice Law and Rules[18] where the burden is on the defendant to prove that the plaintiff is not entitled to an order of attachment, and the court cannot consider the merits of the controversy.

The New York cases interpreting § 6223 and its predecessor are legion that unless the papers upon which

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[17] Article 3506 of the Louisiana Code of Civil Procedure provides:

> "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued" (416 U.S. at 622).

[18] § 6223 of the New York Civil Practice Law and Rules provides:

> "Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move on notice to each party and the Sheriff, for an order vacating or modifying the order of attachment. Upon motion the court shall give the plaintiff a reasonable opportunity to correct any defect. If after the defendant has appeared in the action the court determines that the attachment is unnecessary to the security of the plaintiff it shall vacate the order of attachment."

the attachment was based "clearly indicate that the plaintiffs must ultimately fail" the attachment may not be vacated (*Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 1923, 234 N.Y. 372, 377). The burden is upon the defendant whose property has been seized without notice or hearing to establish that the plaintiff cannot succeed in the action (*Bard-Parker Co.* v. *Dictograph Products Co.,* App. Div. 1st Dept. 1940, 258 App. Div. 638, 17 N.Y.S. 2d 588) and the burden of proof as to whether plaintiff has shown a valid and meritorious cause of action to support the order of attachment is upon the party seeking to vacate it (*American Reserve Ins. Co.* v. *China Ins. Co.,* 1948, 297 N.Y. 322, 79 N.E. 2d 425; *Cocoline Chocolate Company* v. *Hillside Enterprises, Inc.,* Sup. Kings County 1965, 45 Misc. 2d 594, 257 N.Y.S. 2d 444; *Auerbach* v. *Grand Nat. Pictures, Limited,* Sup. N.Y. County 1941, 176 Misc. 1031, 29 N.Y.S. 2d 747). The burden of proof is upon the defendant to establish that the attachment is unnecessary (*Hydromar Corporation of Delaware* v. *Construction Aggregates Corporation,* App. Div. 1st Dept. 1969, 32 A.D. 2d 749, 300 N.Y.S. 2d 797; *George A. Fuller Company* v. *Vitro Corporation of America,* App. Div. 1st Dept. 1966, 26 A.D. 2d 916, 274 N.Y.S. 2d 600; *Zeiberg* v. *Robosonics, Inc.,* App. Term, 1st Dept. 1964, 43 Misc. 2d 134, 250 N.Y.S. 2d 368; *B. B. Weit Printing Inc.* v. *Frances Denney, Inc.,* S.D.N.Y. 1969, 300 F. Supp. 405; *Kend* v. *Chroma-Glo, Inc.,* D. Minn. 1970, 51 F.R.D. 547).

Unlike the Louisiana sequestration procedure which requires the plaintiff to prove the grounds upon which the writ was issued, the merits of the controversy may not be considered by the court and are irrelevant on a motion to vacate the attachment under § 6223 (*Kneapler* v. *Braufman,* App. Div. 2d Dept. 1943, 266 App. Div. 756, 41 N.Y.S. 2d 261; *Bard-Parker Co., Inc.* v. *Dictograph Products Co., Inc., supra; Marklin* v. *Drew Properties Corp.,* S.D.N.Y. 1967, 280 F. Supp. 176).

In *Marklin* v. *Drew Properties Corp., supra,* Judge Motley pointed this distressing fact out, 280 F. Supp. at 179:

> "Under the law of New York it is settled that: '• • • the court should not attempt to decide in advance the merits of the controversy by vacating the attachment unless the complaint and affidavits *clearly indicate* that the plaintiff *must* ultimately fail'" (citing cases).

Thus, under the New York law the defendant, whose property has been seized without notice and hearing, cannot even secure a hearing prior to the eventual trial on the merits, to require the plaintiff to prove the grounds upon which the attachment was granted. The limited hearing provided for in § 6223 shifts the burden to the defendant, and he must prove as a matter of law that the plaintiff cannot succeed under any state of facts, a truly insurmountable task, and the court at such a hearing is even prevented from considering the merits of the controversy.

The Supreme Court has held that "it is plain that where the burden of proof lies may be decisive of the outcome" (*Speiser* v. *Randall,* 1958, 357 U.S. 513, 525), and shifting that burden from the plaintiff to the defendant, as a result of the failure to give the defendant prior notice and hearing is a denial of due process since "these burdens would not have been imposed upon [the defendants] had [they] beeen given timely notice in accord with the Constitution" (*Armstrong* v. *Manzo,* 1965, 380 U.S. 545, 551). As pointed out by Mr. Justice Stewart, 380 U.S. at 551.

> "Had the petitioner been given the timely notice which the constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case against whatever defenses the petitioner might have interposed. • • • Had neither side offered any evidence those who initiated the adoption proceedings could not have prevailed.

> "Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For it is plain that where the burden of proof lies may be decisive of the outcome. Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Yet these burdens would not have been imposed upon him and he been given timely notice in accord with the Constitution."

Thus, the New York Attachment Statute is constitutionally invalid on its face and in its application since it makes no provision whatsoever for an immediate hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual trial on the merits, which may be several years hence. Due process requires that the right to such hearing "must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo,* 380 U.S. at 552), and the deferring of such hearing until the eventual trial on the merits is constitutionally impermissible when one's property has been seized without notice and hearing.

What limited hearing that is provided for under § 6223 shifts the burden of proof to the defendant, who received no notice or opportunity to be heard prior to the granting of the order of attachment authorizing the seizure and upon such hearing the plaintiff is not required to prove anything but rather the defendant must either establish that the plaintiff must fail under any state of facts as a matter of law, or else the attachment continues, no matter

how weak or far-fetched is the plaintiffs' case, and the court is prevented from considering the merits of the controversy.

The appellants urge this court with the argument that the District Court erred in its interpretations of the New York law by limiting the basis for vacatur to "unnecessary security." They further argue that such findings by the District Court were found to be erroneous by recent state court decisions rendered since the decision of the District Court. Appellants contend that none of such decisions have accepted the District Court conclusion that there is no meaningful opportunity to vacate an attachment. It would appear that appellants would urge on this Court that the recent rash of decisions by the lower courts of New York are dispositive of the issue that no meaningful early hearing is available by which a defendant may vacate an order of attachment.

The argument of the appellants has a fundamental failing. Such argument assumes that vacaturs granted by such lower courts of New York for jurisdictional purposes satisfy the District Court's objections.

In *Regnell* v. *Page,* New York Law Journal (N.Y.L.J.) May 23, 1975, p. 14, c. 2 (Sup. Ct., N.Y. Co. Fein, J.) the court found that

> "[T]he papers in support of the attachment indicate a concession by defendants that the reports were false and that underpayments were made. *A hearing under such circumstances would have no valid purpose."* (emphasis supplied)

Thus the principal lower court case upon which appellants rely clearly establishes that at the very most the New York Courts need not grant "a hearing" as a matter of right. The citations of authority and argument in *Regnell* with respect to the New York Attachment Statutes contradicts the constitutional imperative of an early post-garnishment hearing.

In *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974), the court vacated the attachment in part pursuant to the New York Attachment Statutes on jurisdictional grounds because plaintiffs had failed to establish a *prima facie* case of any intent to defraud creditors. The court stated that such intent cannot be "presumed". The mere disposition and removal of property does not satisfy the allegations necessary to sustain a *prima facie* case and thus the Court vacated on jurisdictional grounds.

In *Macmillan, Inc.* v. *Hafner,* 42 A D 2d 533, 344 N.Y.S. 2d 729 (1st Dept. 1973), the attachment was vacated because the plaintiff failed to present "but a scintilla of proof as to the requisite elements of a fraud case" in support of its application for the drastic remedy of attachment. The writ of attachment accordingly was vacated for jurisdictional reasons.

In *Richman* v. *Richman,* 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973), that appellate court vacated an attachment because the affidavit in support of the writ of attachment failed to set forth facts to sustain the allegations. Accordingly, the record before the court was insufficient to sustain the issuance of the writ of attachment for jurisdictional reasons to support the drastic remedy of attachment.

Again in *Martin Enterprises, Inc.* v. *MS. Caplin Co.,* 45 A D 2d 883, 358 N.Y.S. 2d 160 (2d Dept. 1974), the Court again struck down a writ of attachment for jurisdictional purposes since the affidavit and exhibits failed to establish the commission of the intentional torts pleaded. The court struck down the drastic remedy of attachment in that the plaintiff failed to set forth the jurisdictional elements necessary to sustain the drastic remedy of attachment. Nowhere in the decisions of recent vintage cited by the appellants is there language that a defendant is entitled to an early post-garnishment hearing as a matter of right. (*Marshall, Bratter, Greene, Allison & Tucker* v. *Knight,*

N.Y.L.J., Dec. 20, 1974, p. 2, c. 3; *Salerno* v. *Salerno*, N.Y.L.J., Jan. 24, 1975, p. 18, c. 2; *Boston Old Colony Ins. Co.* v. *Bianchi*, N.Y.L.J., Feb. 26, 1975, p. 16, c. 1; *New York Auction Co.* v. *Belt*, N.Y.L.J., April 9, 1975, p. 17, c. 3). In fact, in *Regnell* v. *Page*, so heavily relied upon by appellants, the court states that "a hearing under such circumstances would have no valid purpose." Can we say that the Fourteenth Amendment's constitutional imperative is satisfied by the discretionary authority in the hands of the judiciary to grant a hearing? Surely the mandate of this court in *Snaidach, Fuentes, Mitchell* and *Di-Chem* is not met by the express language or the judicial interpretations of the New York Attachment Statute.

This outrageous result is a flagrant and blatant deprivation of due process, which would never be approved by the Supreme Court either under the *Snaidach, Fuentes* or *Mitchell* standards. Even assuming that the breadth of *Mitchell* is such that it is applicable to prejudgment proceedings where the creditor has no present interest in the property to be seized, the fact that Article 62 does not enable the debtor whose property has been seized, without notice or hearing to seek dissolution of the attachment unless the plaintiff proves the grounds upon which the order of attachment was issued, makes the New York Attachment constitutionally invalid, on both its face and in its application.

Under the New York Attachment Statute the plaintiff is not required to prove the grounds upon which the Order of Attachment was issued, either before or after its issuance, and may defer such proof until the eventual trial which may be many years hence, which of course is constitutionally impermissible and requires that it be declared unconstitutional in violation of the due process clause for that reason alone.

POINT II

The New York Attachment Statute is not so narrowly drawn as to limit its affect to unusual conditions where a creditor could show that the debtor will destroy or conceal the property to be seized, in which the creditor has an interest and is therefore constitutionally impermissible.

In *Fuentes* the Supreme Court, indicated that it would permit a prejudgment seizure of property without notice and hearing in a case "in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods [but that the statute would have to be] narrowly drawn to meet any such unusual condition" (407 U.S. at 93).

The Louisiana sequestration procedure upheld by the Supreme Court in *Mitchell* was so narrowly drawn to meet such unusual conditions in that it was limited to a situation where the creditor had a specific right in the property to be seized, but only if the defendant has it within his power "to conceal, dispose of, or waste the property" (Louisiana Code of Civil Procedure, Art. 3571, 40 L. Ed. 2d at 422).

However, the New York Attachment Statute is not so narrowly drawn, nor is its application limited to property in which the creditor has an interest. In fact it does not even relate to such type property, which is covered by Article 71 of the Civil Practice Law and Rules, which after having been declared unconstitutional was amended to comport with due process (see p. 20, *ante*). Nor with the possible exception of subparagraph 4 of § 6201 is it limited to situations where the defendant has or may conceal or dispose of his property. (See Memorandum Opinion of Judge Lasker [J.S. 15a-30a at 28a].)

The pertinent provisions of § 6201 which are herein involved are subparagraphs (4), (5) and (8), which authorize an order of attachment when

> "4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or
>
> "5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or
>
> "8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

The order of attachment herein was granted against Champion Sports under subparagraphs (4), (5) and (8) against Sugar under subparagraphs (5) and (8) and against Wrestling Revue under subparagraph (8) *only* (see p. *ante*). Pursuant thereto the Sheriff seized wages of Sugar in the amount of $124.17 and monies belonging to Wrestling Revue of $24,200, all from National Sports, in which Curtis had no interest whatsoever. No property of Champion Sports was ever seized, and it was the only defendant against whom Curtis claimed a state of facts relating to the disposition or secretion of property.

With respect to the seizure of Sugar's wages under subparagraphs (5) and (7) this unquestionably was a due process deprivation under the rule of *Snaidach,* which no matter what the breadth and scope of *Mitchell,* requires the declaring as unconstitutional the New York attachment procedures as it relates to wages as being unconstitutional.

Finally, the court is left with the final question of whether or not subparagraph (8) under which all of Wrestling Revue's monies, amounting to $24,200 was seized, can survive a constitutional attack under the rules

of *Snaidach, Fuentes, Mitchell* and *Di-Chem.* The plaintiffs submit that it cannot.

A constitutional attack on CPLR § 6201(8) was launched in the New York State Courts shortly after the Supreme Court decision in *Fuentes.* In *Richman* v. *Richman,* Sup. Albany County 1973, 72 Misc. 2d 803, 339 N.Y.S. 2d 589, the trial court in declaring § 6201(8) unconstitutional stated:

> "It is the opinion of this Court that CPLR § 6201, Subdivision 8, which is the subdivision that the plaintiff proceeded under in obtaining the order of attachment in the instant case, is not, when read in conjunction with Section 6211 CPLR, in conformity with due process. It does not contemplate one of the extraordinary situations necessary to secure jurisdiction. (Ownbey v. Morgan, 1920, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837).
>
> • • • •
>
> "This Court is of the opinion that Subdivision 8 of CPLR 6201 is the section least likely to survive and is of the further opinion that it cannot survive for there is no foreseeable important governmental or public interest or 'unusual' situations which would warrant a denial of a prehearing."

However, the Appellate Division, Third Department, at the urging of Attorney-General of New York, refused to rule on the constitutional question, and affirmed the order of the trial court on other grounds (*Richman* v. *Richman,* 1973, 41 A.D. 2d 993, 344 N.Y.S. 2d 52).

Subparagraph (8) permits an order of attachment in any action for "conversion • • • or for fraud or deceit". The plaintiff need have no interest in the property to be seized, nor need he allege or establish any facts relating to secretion or disposition of the property. All he need

allege is that he has a cause of action for conversion or for fraud or deceit, and no matter how weak, nebulous or far-fetched his case is he need not prove the facts upon which the attachment was granted until the eventual trial on the merits, and unless the defendant can sustain the insurmountable burden that the plaintiff must ultimately fail, he cannot seek a dissolution of the attachment. This is an outrageous deprivation of due process in violation of the Fourteenth Amendment for the reasons set forth by this Court in *Snaidach, Fuentes, Mitchell* and *Di-Chem,* and for the further reasons set forth in this Brief, requiring this Court to affirm the decision below that the New York attachment procedures are constitutionally impermissible.

The deprivation of due process is more onerous where the color of due process is alleged or claimed without according the defendant any hearing to correct the seizure of property. The "hearing," "burden of proof," "right to vacate," and other rights of due process alleged to exist here are not meaningfully available. This is precisely what the Court referred to in *Coe* v. *Armour Fertilizer Works,* 1915, 237 U.S. 415 at 424, 425, when it stated:

> "Nor can extra-official or casual notice or a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * * The law must require notice to [defendants] and give them the right to a hearing and an opportunity to be heard."

This Court made it ever so clear that statutory vagueness, as in the New York attachment procedure is constitutionally impermissible and "the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." 237 U.S. 425 citing *Roller* v. *Holly,* 176 U.S. 398, 409.

CONCLUSION

The New York Attachment Statute is constitutionally impermissible and the findings and order of the court below should be affirmed.

Respectfully submitted,

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